No. 94-1281

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF

In The

Supreme Court of the United States

October Term, 1994

CROW TRIBE OF INDIANS,

Petitioner,

vs.

CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION, d/b/a SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY and KMH RANCH COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CAMPBELL FARMING CORPORATION

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QUESTIONS PRESENTED

1. Did the Court of Appeals for the Ninth Circuit properly find, pursuant to decisions of this Court, that Congress did not grant to the Crow Tribe a right of action to enforce Section 2 of the Crow Allotment Act?

2. Did the Ninth Circuit affirm the District Court's dismissal on grounds which were supported by the record?

3. Do adequate and independent bases exist for the Ninth Circuit's decision since the Tribe has no standing to pursue its claims, and those claims are barred by the statute of limitations?

LIST OF PARTIES

All parties to the proceeding below were identified in the Petition For Writ of Certiorari filed herein at pages ii and iii.

None of the corporate parties identified have any parent companies, subsidiaries (except wholly-owned subsidiaries), or affiliates that have issued shares of stock to the public that are not named parties herein.

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TO THE HONORABLE SUPREME COURT:

The Respondent, Campbell Farming Corporation, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Crow Tribe of Indians.

OPINIONS BELOW

Respondent adopts the citations to the opinions below contained in the Petition. The opinions below are reproduced in the Appendix to the Crow Tribe's Petition For A Writ Of Certiorari and all references to said opinions in this Brief In Opposition correspond to the appendix pages contained in the Petition.

STATEMENT OF JURISDICTION

Respondent Campbell Farming Corporation accepts and adopts the Statement of Jurisdiction of the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision, Section 2 of the 1920 Crow Allotment Act, 41 Stat. 751, is reproduced at pages 2-3 of the Crow Tribe's Petition For A Writ Of Certiorari.

STATEMENT OF THE CASE

This action concerns Section 2 of the Crow Allotment Act, 41 Stat. 751 (1920), which is one of several reservation specific allotment acts enacted in furtherance of the policies underlying the Dawes Act of 1887, 24 Stat. 388, *as amended*, 25 U.S.C. § 331, *et seq.*

The history of the Crow Reservation began on May 7, 1868, with the Second Treaty of Fort Laramie. The Reservation encompasses some 2.3 million acres, mostly grazing land, although portions are usable for dryland or irrigated farming. The Crow Tribe is and has always been a stranger to the title to said lands. The lands set aside in the Treaty of Fort Laramie were for the "use" of the Crow Tribe, but title remained in the United States. *See* Article I, Treaty of Fort Laramie. Allotment of reservation lands was first prescribed in Article VI of the Treaty which provides in part:

> If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres . . .
>
> Any other person over eighteen years of age, not being the head of a family, may in like manner select . . . for purposes of cultivation, a quantity of land not exceeding eighty acres . . .

The policy of allotment continued with the passage of the Dawes Act, more commonly known as the Indian General Allotment Act (GAA). Under the GAA, lands were to be allotted to individual Indians but the United States would hold legal title for 25 years after which a fee patent would issue to the allottee or his heirs. Ch. 119, 24 Stat. 388 (1887).

The Crow Allotment Act was passed into law in 1920. Under the CAA, lands within the Reservation were to be allotted to individual Crow Indians as follows:

> [O]ne hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allottable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allottable tribal lands for his total allotment of land of the Crow Tribe.

Section 2 of the CAA contains restrictions on the conveyance of allotted parcels by the allottees. Specifically, the provision prohibits conveyances from the allottee to any non-Indian who already owns at least six hundred and forty acres of agricultural, or one thousand two hundred and eighty acres of grazing, land within the Reservation, or to any person who would, as a consequence of the conveyance, own more than one thousand two hundred and eighty acres of agricultural land, or one thousand one hundred and twenty acres of grazing land, within the Reservation.[1] Section 2 limits the power of the Secretary of the Interior to approve conveyances which would violate the acreage limitations. Section 2 also declares void any such conveyance, and imposes criminal liability on any grantee

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1. As originally enacted, Section 2 prohibited approval of any conveyance exceeding the acreage limitations — even to another Tribal member. Congress amended the provision in 1940 to allow purchases of any size by Indians in order to facilitate consolidation of family ownership. *See* 54 Stat. 252 (1940).

involved in such a transaction. Although Section 2 prohibits conveyances by Indians which exceed the acreage limitations, nothing contained therein prohibits ownership beyond those limitations.

Today some 650,000 acres are held by non-Indians, mostly farmers or ranchers, many of whom work lands which have been in their families for years. At present, the Crow Reservation is characterized by a "checkerboard" of ownership similar to that of most western reservations which were subject to the allotment policy. The distribution of ownership in 1980 was described by this Court in *Montana v. United States*, 450 U.S. 544, 548 (1981):

> . . . roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.

The Tribe is nowhere mentioned in Section 2, nor was the Tribe an intended beneficiary of the salutary effects of this provision since it, along with every tribe covered by the Dawes Act and its progeny, was to pass out of existence once the goals of the allotment policy were achieved. The congressional purpose behind the allotment policy was the assimilation of individual Indians into general society and the elimination of Indian tribes.

Although congressional policy changed with the passage of the Indian Reorganization Act of 1934, the provisions of that statute were to have no force or effect over lands previously allotted pursuant to the Dawes Act and its reservation specific offspring. 25 U.S.C. § 461; *See also Brendale v. Confederated*

Yakima Nation, 492 U.S. 408, 432 (1989). Consequently, the allotment of lands which followed passage of the Crow Allotment Act was a *fait accompli* which would not be reversed even with the new direction in Indian policy evidenced by the Reorganization Act.

In 1991, the Crow Tribe, an entity which would no longer exist had the goals of the allotment policy been achieved, asserted its alleged rights under Section 2.[2] The Tribe contends that Section 2 actually limits the amount of land a non-Indian may own within the Reservation. The landowners disagree with this interpretation of the statute, and instead assert that Section 2 merely prohibits conveyances by the original allottees to non-Indians in excess of the acreage limitations. Although the Tribe has attempted throughout the litigation to avoid discussion of the remedies to be fashioned in the event it succeeds, it is apparent that the Tribe has pursued this case in hopes the Courts will quiet title in the Tribe even though the allotted lands were never owned by the Tribe, but were instead granted to individual Crow Indians.[3]

The District Court dismissed the Tribe's claims on grounds it

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2. Both the Tribe and the Government have been aware of Section 2 since passage of the Crow Allotment Act, yet neither brought suit under the provision for over 70 years, until the Tribe initiated this action. In the meantime, non-Indian landowners have labored to improve and increase the value of their properties and could be dispossessed without compensation should the Tribe prevail in this case.

3. Claims by individual allottees under Section 2 have been held subject to Montana's five year statute of limitations. *Dillon v. Antler Land Co.*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 941 U.S. 992 (1975). The *Dillon* Court found that the GAA subjected lands which had been patented in fee to state law. It was in part on the basis of *Dillon* that the District Court concluded that the Crow Tribe's Section 2 claims were untimely under Mont. Code Ann. §§ 70-19-401, 402 (1991).

could not satisfy the constitutional requirements for standing. The District Court found that the Tribe could not establish that it suffered an injury from the alleged violations of Section 2, which provision was directed at transactions between allottees and potential purchasers. Vague and speculative claims that the presence of large landholders hurt the Tribe, or that the public policy behind Section 2 was to prevent accumulation of large landholdings, fell short, the District concluded, of proving the type of concrete injury that is a prerequisite to standing. (App. 29).

The District Court also concluded that the Tribe's claims against Campbell Farming Corporation were barred by the statute of limitations. Pursuant to 25 U.S.C. §§ 347 and 349, Montana's five year statute was to govern Section 2 claims since Congress subjected all allotted lands, once patented, to the authority of state law pursuant to those provisions of the Dawes Act. App. 22. The District Court found additional support for its conclusion in this Court's 1992 decision, *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S.__, 112 S.Ct. 683 (1992). The District Court read *Yakima* to have drawn a distinction between state *in rem* versus *in personam* jurisdiction, and concluded that state law governs cases *in rem* "whether the individual allottee or the Tribe brings the lawsuit." (App. 23). Following that line of reasoning, the District Court held that the Montana statute of limitations barred all claims not brought within the five year limitations period.

The United States Court of Appeals for the Ninth Circuit affirmed on grounds the Tribe had no right of action under Section 2. In a unanimous opinion authored by Judge Canby, the Circuit Court held that under rules promulgated by this Court for determining whether Congress intended a party to have a right of action to enforce a statute, the Tribe could not prosecute this suit. Citing *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Circuit Court

concluded that the language and remedial structure of Section 2 indicated "that Congress did not intend to vest the Tribe with a cause of action...". (App. 9). The Circuit Court also reviewed the legislative history of Section 2 and found further support for the conclusion that the Tribe had no right of action. (App. 10). The Tribe's petition for rehearing was denied without comment.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT PROPERLY APPLIED THE DECISIONS OF THIS COURT IN HOLDING THAT THE TRIBE HAD NO RIGHT OF ACTION UNDER SECTION 2.

A. The Tribe Could Not Establish Either That It Was Part Of The Class For Whose Especial Benefit Section 2 Was Enacted.

In *Cort v. Ash, supra*, 422 U.S. at 78, this Court set out a four part test for determining whether Congress intended a plaintiff to enjoy a private right of action to enforce a statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted).

In concluding that the Crow Tribe had no right of action, the Ninth Circuit reviewed Section 2 under the first and second prongs of the *Cort* test.[4]

The Circuit Court began its analysis of the *Cort* factors by examining the language of Section 2. The Circuit Court observed that one important indication that Congress did not intend to afford the Tribe a right of action is that the Tribe is not among the "actors mentioned in Section 2." (App. 6). While the Tribe's omission "is not conclusive . . . ," (App. 6), this Court has noted that a critical fact in determining whether Congress intended that a given plaintiff enjoy a right of action is "language [which] . . . explicitly confers a right directly on a class of persons that include[s] the plaintiff in the case." *Universities Research Association*, 450 U.S. at 771-772 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979)).

As the Circuit Court noted, only Indians in their individual capacities are referred to in Section 2. The Tribe is not mentioned nor is there even a general reference to "Indians." (App. 6). The statute benefits individual allottees who happen to be Tribal members, but bestows no rights upon the Tribe, which entity was to cease to exist once the goal of assimilation was reached. In addition, the Tribe was a stranger to the title on the allotted lands so had no interest in the conveyances between allottees and potential purchasers with which Section 2 is concerned.

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4. Although the Tribe takes exception to the Circuit Court's failure to consider the third query, *i.e.*, whether a tribal cause of action would be consistent with the legislative scheme, *See* Petition, p.17, this Court has held that when plaintiff is not among the class especially benefited by the statute, and the legislative history provides no indication the plaintiff enjoys a right, "the remaining two *Cort* factors cannot by themselves be a basis for implying a right of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 580 (1979) (Brennan, J. concurring), *accord Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754, 770, n.21 (1981).

Congress did not and could not have intended that the Tribe have a right of action under the circumstances. The Circuit Court was correct in holding: "The use of such specific terms in the statute suggests that the statute was enacted for the benefit of a group of individuals, each of whom is a member of the Tribe, and not for the benefit of 'the Tribe.' " (App. 6).[5]

B. The Remedial Structure Of Section 2 Indicates The Tribe Has No Right Of Action.

The second basis for the Circuit Court's finding that the Tribe had no right of action to enforce Section 2 was the narrow and specific remedial structure of the provision. Section 2 provides three mechanisms for preventing sales in violation of the acreage limitations: 1) the Secretary of the Interior was to refuse to approve conveyances which violated the acreage limitations; 2) any purchaser who bought land in excess of the limitations was liable for a misdemeanor; 3) the allottee could bring a civil action to have the conveyance declared void. Neither

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5. It is important to understand that Congress could not have intended that the Tribe have a right of action since "The objectives of allotment were simple and clear-cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *County of Yakima v. Yakima Nation*, 502 U.S. at __, 112 S.Ct. at 686 (citing *In re Heff*, 197 U.S. 488 (1905)). The Tribe was to pass out of existence pursuant to both the Dawes Act and the Crow Allotment Act, and would not have existed to act as a plaintiff had congressional goals been achieved.

Congressional policy changed in 1934 with passage of the Indian Reorganization Act. However, Section 2 must be interpreted in light of the policy's extant at its passage, not in regards to subsequent congressional actions. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978). Moreover, as to the lands here at issue, which were previously allotted parcels, "Congress made no attempt to undo the dramatic effects of the allotment years on the ownership of former Indian lands." *County of Yakima*, 502 U.S. at __, 112 S.Ct. at 686.

the prohibition on approval of excess conveyances by the Secretary, nor the power to prosecute the misdemeanor charges, were functions intended by Congress to be carried out by the Tribe. (App. 6). Consequently, the Circuit Court concluded that if the Tribe had any toehold in the statute it must be to sue to "void" transactions in violation of Section 2. But, as the Circuit Court recognized, the remedial structure of Section 2 indicates that the Tribe, a stranger to title, has no such right. The Tribe was not party to the transactions, did not own the transferred land, and even if a successful claim were brought it would be the allottee, not the Tribe, who would benefit since lands upon which title was held void would be restored to the allottee.

The Tribe takes issue with the Circuit Court's conclusion that the lone remedy available under Section 2 is an action to void any unlawfully transferred title.[6] However, the authorities cited by the Tribe actually support the Circuit Court's conclusion that

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6. The Tribe's contention that the remedies issue is complex, Petition, p.16, is at odds with the unambiguous language of Section 2. Moreover, the Tribe's citation to *Franklin v. Gwinnett County Public Schools*, 503 U.S. __, 112 S. Ct. 1028 (1992), for the proposition that courts can freely fashion remedies is utterly misplaced. In *Franklin*, this Court reached several conclusions which are inconsistent with the Tribe's contentions. First, the Tribe seeks to establish its power to sue by setting the remedies horse before the cart of Congressional intent. As the *Franklin* Court declared, "the question of whether a litigant has a "cause of action" is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." 503 U.S. at __, 112 S. Ct. at 1034 (quoting *Davis v. Passman*, 442 U.S. 228. 239 (1979)). The Tribe's suggestion that the remedies under Section 2 are open to discussion is not germane to the question of whether Congress intended it to have a right of action under Section 2. Further *Gwinnett* involved the party harmed and on whose behalf the action was filed. In this case the Tribe, which is not a beneficiary of Section 2, seeks the right to bring an action. Lastly, in *Gwinnett* the Court had the power to fashion an appropriate remedy because the statute at issue was "silent on the question of remedies . . . " *Id.* Section 2, on the other hand, unambiguously declares that the allottee may sue to void title. *Gwinnett* is of no relevance to the instant case.

the remedy afforded by Section 2 rests exclusively in the allottee. In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Court considered whether a merger contract obtained pursuant to defective proxies was *per se* void under Section 29(6) of the Securities Exchange Act. The Court held that the guilty party is prohibited from enforcing the contract against an unwilling innocent party, and in this sense the contract is void, but the innocent party may nevertheless enforce the contract if he concludes to do so would be in his best interest. 396 U.S. at 388. In this latter sense the Court drew the conclusion that void could mean voidable.[7]

As for this case, the allottee who conveys property in violation of Section 2 enjoys the same option since he may conclude that a suit to void title is contrary to his best interests. However, it is the allottee who is empowered to make the decision, not a third party stranger, such as the Tribe. Section 2 affords the individual a choice, but does not grant to the Tribe a right to make the choice for the allottee.[8]

An additional difficulty with the Tribe's reasoning is that Section 2 unambiguously restricts the right of action to the

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7. Other cases relied upon by the Tribe are equally supportive of the Ninth Circuit's decision. In *Ewell v. Daggs*, 108 U.S. 143 (1883), the Court left it to the victimized party whether to seek to void a contract which violated a Texas usury statute. Similarly, in *Atlantic Coast Line Railroad Co. v. State of Florida*, 295 U.S. 301 (1935), those who paid charges levied under a voidable Interstate Commerce Commission order were able to claim the sums paid as an equitable remedy. But in each case, the party involved in the transaction was afforded the right to seek the remedy.

8. The Tribe tacitly acknowledges that the Circuit Court was correct in holding that the Tribe has no cause if the only remedy for a violation of Section 2 is to void the title. The Tribe's argument that "void" does not necessarily mean the transaction is a nullity indicates that the Tribe is aware that a void title would revest the lands in the allottee, hence no benefit would run to the Tribe.

allottee. *California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide); *See also National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("when legislature expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). The question of whether a statute confers a right of action on a particular plaintiff is a matter of statutory construction. *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981). Statutory interpretation begins "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (citing *Park'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)). The language of Section 2 leaves no room for debate as to Congress' intent; the remedy is solely in favor of the individual allottee. The Tribe has no right of action under Section 2 and the petition for a writ of certiorari is properly denied.

II. THE LEGISLATIVE HISTORY BEHIND SECTION 2 ESTABLISHES THAT THE INDIVIDUAL ALLOTTEES ALONE ARE EMPOWERED UNDER SECTION 2 TO BRING AN ACTION.

A. The Legislative History Demonstrates That The Allottees Were To Assume Responsibility For Protecting Their Property Rights.

The Tribe, in an effort to confuse the issues concerning whom Congress intended would have a cause of action under Section 2, contends that the Ninth Circuit erred by ignoring this Court's precedents concerning "tribes" versus "tribal members." The Tribe contends that if Section 2 was designed to protect

individual allottees, who would be members of the Crow Tribe, then it, like any government, should have a right to bring a cause to protect its citizens.

The Tribe ignores the fact that it was Congress which drew the distinction between allottees and the Tribe in enacting both the Crow Tribe Allotment Act and the Dawes Act, for it was indisputably the goal of the allotment acts to terminate Indian tribes and assimilate members into general society. The process of assimilation was designed to create in the individual allottees both an appreciation for their rights as property owners and an understanding that they alone were responsible for protecting those interests. The Circuit Court was attuned to Congressional intent in observing "Even under the Tribe's interpretation, the Act was drafted to make individual Indians more independent and to encourage them to become reliant on their own individual parcels of land." (App. 9). In view of Congressional goals in effect at the time the CAA was enacted into law, the Circuit Court was surely correct in reaching the conclusion that "it is reasonable to assume that Congress expected individual Indians to bring their claims in their own behalf, rather than expect the Tribe to protect their right." (App. 21).

The legislative history bears out the Circuit Court's conclusions. As a general summary of the legislative goals underpinning the allotment acts this Court has observed:

> The policy of the Acts was the eventual assimilation of the Indian population . . . and the "gradual extinction of Indian reservations and Indian titles." *Draper v. United States*, 164 U.S. 240, 246, 41 L. Ed 419, 17 S. Ct. 107. The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was

> designed to eventually eliminate tribal relations ... And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations ...

Montana v. United States, 450 U.S. at 559, n.9.[9]

The legislative history of the Crow Allotment Act establishes that the communal system which had characterized tribal life, and in the midst of which tribal government would have functioned, was to be "abandoned as speedily as possible." S. Rep. No. 219, 66th Cong., 1st Sess. 5 (1919). The purpose of the Crow Allotment Act — assimilation of Indians and extinction of the Tribe — could only be accomplished if the allottees assumed responsibility for protecting their own rights:

> The bill provides that those who are competent shall be placed upon their own resources and be given all their property and all the rights and privileges of citizenship under proper safeguards. It also provides for those not yet fully competent, and that these may as rapidly as possible be made

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9. The *Montana* Court further noted: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." It defies common sense also to expect that Congress intended a right of action in the Tribe to protect the interest of individual allottees, when those allottees were to be assumed into the general population, subjected to state law, and the tribes were to cease to exist.

> independent of the guardianship exercised over them by the United States Government, and be given that *individual responsibility which is the ultimate achievement aimed at in the proper settlement of what is known as the Indian problem.* (emphasis added)

59 Cong. Rec. H5999 (April 22, 1920) (Comments of Congressman Riddick).

It is wholly disingenuous for the Tribe to contend that the Circuit Court drew some rigid distinction between the Crow Tribe and its members; that distinction was drawn 75 years ago by Congress in enacting the Crow Allotment Act. Congress sought to put an end to the Crow Tribe and to create in each individual allottee a sense of responsibility for protecting his property rights the same as any other citizen in the United States.[10]

B. Cases Cited By The Tribe Are Immaterial Since Congress, Not The Court Below, Drew The Distinction Between The Crow Tribe And The Allottees.

The Tribe's reliance on *Arizona v. California*, 460 U.S. 605 (1983), for the proposition that Tribal participation is encouraged in lawsuits which affect their rights begs the question of whether

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10. Indeed, in footnote 12 of its brief, the Tribe abandons any pretense that it is seeking to protect the rights of the individual allottees in bringing suit. As the Tribe notes, the individual allottees' sole interest in determining whether to sell the property is to maximize the price. As a result, the individual allottees may have no desire to sue to enforce Section 2. That, of course, is precisely the point. Section 2 leaves it up to the individual allottee to determine whether his interests are best protected by bringing an action. The Tribe would superimpose its will on all allottees by bringing an action for their so-called benefit, taking title to the land itself, and freezing out the very individuals whom the Tribe contends it wishes to protect.

Congress intended the Tribe to have a right of action under Section 2. As this Court has so often explained, the issue is not whether the decision will have an effect on the plaintiff, *California v. Sierra Club*, 451 U.S. 287, 294 (1981) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 690-693, n.13 (1979)), but rather did Congress intend plaintiff to have a cause of action to enforce the statute? *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979). While the Tribe may assert some abstract interest in the effect of Section 2, the language and structure of the statute, especially when considered in connection with the goal of tribal extinguishment, are an insuperable barrier to establishing that Congress intended the Tribe to enjoy a right of action.

As for *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1975), several observations are in order. While the Tribe in *Puyallup* had a direct interest in enforcing the treaty rights at issue, here the Crow Tribe asserts claims which concern lands to which it was never titleholder and which were transferred to manifold separate individuals. In addition, the Crow Tribe now acknowledges that it seeks relief which may be contrary to the best interests of the allottees.[11] Finally, the Tribe cannot have a corporate interest to protect when the very provision it seeks to enforce is contained in a statute designed to extinguish the Tribe.

The Tribe's contention that decisions of this Court suggest that tribes have broad responsibility for protecting their members, while perhaps true in the abstract, flies in the face of express congressional policy under the Dawes Act and Crow Allotment Act. The Tribe's belief that it occupies the same position as, to use the Tribe's example, the City of Los Angeles, whose citizens might be the beneficiaries of an earthquake relief

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11. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), illustrates that rights under a statute are limited when Tribal interests conflict with those of members. Such a conflict is now acknowledged by the Tribe. Petition, 18 n.12.

bill which the city should itself be allowed to enforce, is meritless because, while earthquake relief may have some benefit to the City as well as its residents, the Crow Allotment Act was specifically designed to destroy the communal relations amongst Indians and tribes and to assimilate tribal members into the general body politic. The Circuit Court rightly found that the Tribe has no right of action under Section 2, and the petition for a writ of certiorari should be denied.[12]

III. THE TRIBE HAD AMPLE OPPORTUNITY TO ADDRESS THE ISSUE OF WHETHER IT ENJOYED A PRIVATE RIGHT OF ACTION UNDER SECTION 2 IN THE LOWER COURTS.

Every Circuit Court in the country has recognized the rule that an appellate court may affirm on any ground finding support in the record. *See, e.g., Inmates of Supple County Jail v. Rufo*, 12 F.3d 286 (1st Cir. 1993), *on remand*, 844 F. Supp. 31 (D. Mass. 1994); *Railway Labor Executives Association v. Staten Island R.R. Corp.*, 792 F.2d 7 (2nd Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987); *Fairview Township, York County, Com. of Pa. v. U.S. Environmental Protection Agency*, 773 F.2d 517 (3rd Cir. 1985); *Jackson v. Kimel*, 992 F.2d 1318 (4th Cir. 1993); *SIDCO Products Marketing, Inc. v. Gulf Oil Corp.*, 858 F.2d 1095 (5th Cir. 1988), *reh'g denied*, __ F.2d __ (1988); *United States v. Anderson County, Tennessee*, 761 F.2d 1169 (6th Cir. 1985), *cert. denied*, 474 U.S. 919 (1985); *McCarthy v. Kemper Life Insurance Companies*, 924 F.2d 683 (7th Cir. 1991); *Campbell v. Commissioner of Internal Revenue*, 943 F.2d 815 (8th Cir. 1991); *Suydam v. Reed Stenhouse of Washington, Inc.*, 820 F.2d 1506, 1508 (9th Cir. 1987); *Schalk v. Gallemore*, 906 F.2d 491 (10th Cir.

12. The Tribe's contention that 28 U.S.C. § 1362 affords it a private right of action is inapposite. Section 1362 is merely a jurisdictional statute and does not create a right of action in the Tribe. *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

1990); *Barnett v. Bailey*, 956 F.2d 1036 (11th Cir. 1992); *Dimond v. District of Columbia*, 792 F.2d 179 (D.C. Cir. 1986). This Court has recognized the rule on various occasions. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 326 (1986) (citing *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)); *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937), *reh'g denied*, 302 U.S. 781 (1938). The Tribe contends that it was given no opportunity to address the question of whether Congress intended it to enjoy a right of action under Section 2. If, however, the record discloses that the issue was addressed in the lower courts, the Tribe's "fairness" issue is exposed as a red herring.

The Tribe fails to explain that in the nearly 450 pages of briefing presented to the District Court numerous pages included discussions of *Cort v. Ash* and similar tests, and addressed specifically the question of whether the Tribe was intended to have a private right of action under the statute. The matter was also briefed in detail before the Ninth Circuit, with each of the parties specifically citing the *Cort* test and discussing its implications. And, although the Tribe contends that the matter was not raised at the hearing before the Circuit Court, the transcript of the argument establishes that the issue was discussed in detail.[13] In addition, the Tribe had an opportunity to reargue the issue in its petition for rehearing. Therefore, the contention that the Tribe was denied an opportunity to fairly address the issue upon which the Circuit Court rendered its decision flatly misconstrues the record.

As noted above, the Circuit Court was free to affirm the

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13. All briefs that were presented to the District and Circuit Court have been lodged with this Court. Oral arguments before the Ninth Circuit are not stenographically recorded so defendants secured a copy of the tape of the argument, and lodged the transcript with the Court.

District Court on any ground supported by the record. The Tribe argued the applicability of *Cort v. Ash* test and responded to the arguments made by defendants. The Ninth Circuit worked no unfairness on the Tribe in deciding the case on the basis of *Cort v. Ash* and in holding that Congress did not intend to create a right of action in the Tribe.

IV. THE NINTH CIRCUIT'S DECISION COMPORTS WITH PREVIOUS DECISIONS FROM THIS COURT, AND THE TRIBE'S PETITION FAILS TO IDENTIFY A QUESTION WHICH NEEDS TO BE SETTLED BY THIS COURT.

This Court has repeatedly declared that the purpose behind the Dawes Act and the allotment policy was the "elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture." *Duro v. Reina*, 495 U.S. 676, 691 (1990); *County of Yakima*, 502 U.S. at __, 112 S.Ct. at 686; *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 423 (1989); *Solem v. Bartlett*, 465 U.S. 463, 468 (1984). Leading commentators, too, have recognized that the goal of the allotment acts was both the assimilation of Indians and the extinction of reservations, with the individual allottees assuming the rights and obligations of citizens. F. Cohen, *Handbook Of Federal Indian Law*, 130-132 (1982 Ed.); W. Canby, *American Indian Law 2d*, 19-22 (1988). Given the complementary goals of tribal extinction and assimilation, the Ninth Circuit properly concluded that the burden of enforcing any civil remedy provided for under Section 2 fell on the individual allottees. Since allottees were to be absorbed into society and would no longer be members of the Tribe, it would be incongruous for Congress to intend that the Tribe enjoy a right of action to protect the interests of the allottees.

Consequently, the Circuit Court's determination that

individual Indian allottees alone have a right of action to enforce Section 2 is consistent with this Court's prior rulings concerning the policy of allotment. Both because the Dawes Act and Crow Allotment Act were targeted towards destruction of the tribes, and because allottees were to assume responsibility for protecting their own interests in the land, when considered in concert with Section 2's silence as to any right of action enjoyed by the Tribe, the Ninth Circuit's holding that the Crow Tribe has no right of action to enforce Section 2 is correct. The petition for a writ of certiorari should be denied.

Moreover, the issues presented by this case are of no national importance and need not be resolved by this Court. Section 2 of the Crow Tribe Allotment Act is unique to the Crow Reservation, hence the construction of the provision will have no effect on any other Indian tribe, nor be of any general importance to Indian jurisprudence. The Ninth Circuit decision was correct, and no injustice has been worked upon the Tribe since under the clear provisions of Section 2 the Tribe has no right of action. The Circuit Court's decision dovetails exactly with the decisions of this Court concerning the allotment acts. There are no grounds upon which to grant the petition.

V. THE TRIBE'S ALLEGATIONS OF A CONFLICT BETWEEN THE NINTH CIRCUIT DECISION AND DECISIONS OF OTHER CIRCUIT COURTS IS AN ILLUSION.

Although it is somewhat difficult to pinpoint the conflict between the Circuits upon which the Tribe rests its petition, the Tribe seems to suggest that other Circuit Courts have chosen not to search for specific evidence Congress intended to create a right of action in a given entity. (Petition, p. 20). The Tribe contends that in conducting such an inquiry the Court below acted as a maverick. According to the Tribe, "this aspect of the Court of Appeals' decision is unique and conflicts with the analytical

approach to the cause of action issue and the decisions of other federal appellate courts." (Petition p. 20).

In reality, the decision of the Court below is exactly consistent with the approach taken in the very decisions upon which the Tribe relies. For example, in *American Telephone & Telegraph Co. v. M/V Cape Fear*, 967 F.2d 864, 870 (3rd Cir. 1992), the Third Circuit, relying on the rules enunciated by this Court, held that the existence of a private right of action must be found "in the substantive provisions of the statute." 967 F.2d at 869. Said the *American Telephone & Telegraph* Court, "The primary source of a private right of action is the text of a statute." 967 F.2d at 866. The Ninth Circuit's conclusion that the omission of the Tribe from Section 2 is indicative of Congress' intentions is thus in accord with the reasoning of *American Telephone & Telegraph* Court.

In addition, the *American Telephone and Telegraph Court* read *Cort v. Ash* to require:

> . . . that in the absence of an explicit right of action, one may be implied only if there is either a "clearly articulated federal right in the plaintiff" or a "pervasive legislative scheme governing the relationship between the plaintiff class and the defendant class in a particular regard."

967 F.2d at 870 (quoting *Cort v. Ash*, 422 U.S. at 82). The *American Telephone & Telegraph* Court, while noting that statutes rarely identify their beneficiaries, concluded that although plaintiffs may have been beneficiaries of the Submarine Cable Act of 1888, they could not establish the requisite "clearly articulated" right to bring an action. *Id.* This, of course, is precisely the conclusion reached by the Circuit Court in this case. The alleged conflict between the analytical framework adopted

by the Court below and that pursued by the Third Circuit in *American Telephone & Telegraph* is nonexistent.

The *American Telephone & Telegraph* decision is the only case cited by the Tribe which might in any way suggest a conflict between the circuits,[14] although the Tribe contends that the Ninth Circuit should have observed that Section 2 was designed to benefit Tribal members and therefore the Tribe should have been given a right to enforce the provision for its members. Aside from the previously discussed incongruity in the Tribe's position that it should be allowed to sue to "protect" the rights of allottees by

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14. The Tribe's reliance on *Comtronics, Inc. v. Puerto Rico Telephone Co.*, 553 F.2d 701 (1st Cir. 1977), is not only misplaced but misconstrues the holding in that case. Rather than holding that the plaintiff in that case had an implied right of action, the Court actually concluded that although Comtronics was "within the class of intended beneficiaries" of the relevant section of the Communications Act of 1934, 553 F.2d at 705, still the plaintiff had no implied right to seek damages because of "a clear legislative intent to preclude such a remedy." *Id.* Moreover, the *Comtronics* Court was expressly in agreement with the view that in determining congressional intent to create a private right of action the ancient principle of *expressio unius est exclusio alterius* applied, and that courts would not expand statutory remedies beyond the coverage expressed in the statute. 533 F.2d at 707 (citing *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 458, 470-71 (1974)). The Ninth Circuit applied the same rule in concluding that, based on the remedy afforded by the statute, the Tribe had no implied right of action.

So, too, in *Sterling Suffolk Racecourse Ltd. Partnership v. Burrillville Racing Ass'n, Inc.*, 989 F.2d 1266, 1268 (1st Cir. 1993), *cert. denied*, __ U.S. __, 114 S.Ct. 634 (1993), the Court, citing *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989), stated that the "central focus must be on Congressional intent." Although the Court in *Sterling Suffolk* concluded that plaintiff was within the class which would especially benefit from the statute, the statute at issue "explicitly" identified the parties who could bring a claim and plaintiff was not among them. 989 F.2d at 970. In this case, Section 2 also specifically identifies those who may bring a claim and the Tribe is not one of them.

taking title and dispossessing them, the Tribe fails to explain how this constitutes a conflict between the Circuits. In reality, every Circuit Court applies *Cort v. Ash* to require that a private right of action must be found in the substantive provisions of the statute. As this Court has made clear "the question is the nature of the legislative intent in forming a specific statute, and Cort set out the criteria through which this intent could be discerned." *Davis v. Passman*, 442 U.S. 228, 241 (1979). In this case, the Circuit Court applied precisely the proper test and followed the analytical framework laid down by this Court and adhered to by all the Circuits. There is no conflict between the decision of the Ninth Circuit and those rendered by other circuit courts and therefore no basis to grant the petition.

VI. ADEQUATE AND INDEPENDENT BASES SUPPORT THE DECISION OF THE CIRCUIT COURT SINCE THE TRIBE LACKS STANDING AND ITS CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

A. The Tribe Was Without Constitutional Standing And Therefore The Federal Courts Lack Jurisdiction To Hear The Claim.

In recent times, this Court has developed the doctrine of standing to insure that federal courts address only those matters "historically viewed as capable of judicial resolution," and involving actual "cases and controversies". *Flast v. Cohen*, 392 U.S. 83, 101 (1968). To satisfy the requirements for Article III standing, this Court has long insisted that plaintiffs meet three criteria. First, plaintiff must personally demonstrate "an 'injury in fact' which is concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. __, 112 S.Ct. 2130, __ (1992); *Valley Forge Christian College v. Americans United For Separation Of Church And State, Inc.*, 454 U.S. 464, 472 (1982) (citing

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)). That injury must "fairly . . . be traced" to the defendant's putatively illegal conduct, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41 (1976), and lastly, the injury must be "likely to be redressed by a favorable decision." *Id.* at 38. Although these minimum requirements are admittedly "not susceptible to precise definition," *Allen v. Wright*, 468 U.S. 737, 751 (1984), *reh'g denied*, 468 U.S. 1250 (1984), the Tribe was obliged to demonstrate that it suffered an injury which is "distinct and palpable." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

As has been emphasized throughout the litigation, the Tribe was to pass out of existence pursuant to the Crow Allotment Act, was a stranger to the title to the allotted parcels at issue in this lawsuit, and is nowhere mentioned in Section 2. The mere fact that the Tribe asserts an injury, especially an injury that is as amorphous and imprecise as that herein alleged, will not satisfy the first prong of the standing test.[15]

The District Court recognized the weakness in the Tribe's position as follows:

> The Tribe's allegation that "[t]he acreage limitations under Section 2 were designed to prevent large landowners from controlling and dominating the farming and agricultural economy on the Crow Reservation by acquiring vast amounts of land" it is not a

15. Even before this Court, the Tribe is unable to demonstrate any injury-in-fact sustained by it, but instead relies on the vague claim that large land holdings affect Tribal members who remain on the Reservation and earn a livelihood from the land. The District Court correctly held that such a claim is far too speculative (App. 29). The Tribe cannot forge the first link in the standing chain: an injury-in-fact.

> personal allegation of "actual or threatened injury." It is at best a generalized allegation of the purposes behind § 2.
>
> The Tribe's allegation that "[t]he Defendants' violation of Section 2 of the Crow Allotment Act harms the Tribe and that it violates the public policy behind Section 2 which was to prevent one person, corporation or company from accumulating large landholdings . . ." is not an allegation of a "concrete and immediate" injury to the Crow Tribe. It is a generalized assertion of policy considerations behind § 2 and the speculative inference of the effects of landowners owning large amounts of land.

(App. 29).

As this Court has repeatedly noted, abstract and conjectural injuries are not sufficient to satisfy the threshold requirements of Article III standing. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The District Court properly characterized the Tribe's allegations as speculative. Therefore, since the Tribe cannot satisfy Article III standing requirements, the Circuit Court decision should be upheld and the petition for a writ of certiorari denied.[16]

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16. The Tribe's contention that it could sue to vindicate the rights of individual allottees is forbidden on prudential standing grounds. *Allen v. Wright*, 468 U.S. at 751. As this Court noted in *Allen*, suits to enforce the rights of others fall within the "general prohibition on a litigant raising another person's legal rights." *Id.*

B. The Tribe's Claim Is Barred By The Applicable Statute Of Limitations.

For over twenty years, non-Indian landowners inside the Crow Reservation have relied on a Ninth Circuit decision, *Dillon v. Antler Land Co., supra,* 507 F.2d 940, for the rule that Section 2 claims must be brought within the five-year statute of limitations provided by Montana law. As the Ninth Circuit Court of Appeals explained in affirming the District Court's conclusion in *Dillon*:

> This appeal raises troublesome questions, but that Montana law governs with respect to Appellant's property rights herein is not one of them. 25 U.S.C. § 349, relied on by the District Court in holding that Appellant's first claim is barred by the Montana Statutes of Limitation could scarcely be more explicit in this respect.

507 F.2d 942.

The Montana statute of limitations applies to the lands here at issue because Congress expressly provided that land patented in fee or sold by supervised sale would be governed by state law. *See* 25 U.S.C. §§ 347 and 349; *County of Yakima*, 502 U.S. __, 112 S.Ct. 683. The Tribe flatly admits that its right, if any, to bring a claim is as "the representative of its members." (App. 21).[17] The Tribe, which claims the power to bring this action to

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17. The Tribe's reliance on *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977), wherein the Tribe sought to protect not only its own rights but that of individual members, establishes that the Tribe, which by its own admission is seeking to enforce rights enjoyed by individual members of the Tribe, should therefore be subject to the same defenses as the individual allottees.

vindicate the rights of individual allottees, is barred by that same statute of limitations.

That the Montana statute of limitations should operate to bar the Tribe's claims as well as those of individual allottees is illustrated by this Court's decision in *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 507 (1986). In *Catawba*, the Tribe's constitution had been terminated and Tribal members were made subject to state law. 476 U.S. at 505. Federal trust protections for the Catawba Tribe were discontinued and individual Tribal members were no longer afforded the special protections of federal Indian law. The Catawba Tribe nonetheless sued to recover a sizeable tract of land, but this Court concluded that such claims were governed by the state limitations period.[18]

Like the Tribe in this case, the Catawbas contended that while claims made by individual Tribal members might be subject to the state limitations period, the Tribe itself was not subject to state law under the terms of the Catawba Act. This Court reversed an appeals Court decision which adopted the Tribe's reasoning and noted "It would be most incongruous to preserve special protections for a Tribe whose constitution has been revoked while withdrawing protection for individual members of that Tribe." 476 U.S. at 507. The Court concluded: "Without special federal protection for the Tribe, the state statute of limitations should apply to its claims in this case." 476 U.S. at 507.

In precisely the same manner the Dawes Act and the Crow Allotment Act altered the relationship between the Crow Tribe

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18. The Court did not reach the issue of whether the limitations statute actually barred the claims, instead remanding the case to the Circuit Court which was "in a better position to evaluate such an issue of state law." 476 U.S. at 511.

and the national government. The Crow Tribe was to cease to exist, its members were to be assimilated into society at large, and federal trust protection was to end, with state law to become the governing law in allotment cases. The Montana statute of limitations properly bars the claims brought by the Crow Tribe.[19]

CONCLUSION

The Circuit Court reached the appropriate conclusion in determining that Congress did not intend that the Tribe enjoy a right of action to enforce Section 2. Given the full airing of the issues in the Courts below, the Crow Tribe's petition for a writ of certiorari should be denied.

Respectfully submitted,

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19. Campbell Farming Corporation offered an uncontroverted affidavit at the District Court which established that, with the exception of one small parcel purchased from a *non-Indian*, there had been no conveyances of allotted land in the five years preceding the filing of the complaint.

OPPOSITION

BRIEF

(3)

No. 94-1281

Supreme Court, U.S.
FILED
MAR 1 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

CROW TRIBE OF INDIANS,

Petitioner,

vs.

CAMPBELL FARMING CORPORATION; ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION d/b/a SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY and KMH RANCH COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ROBERT EARL HOLDING; SINCLAIR OIL CORPORATION D/B/A SUNLIGHT RANCH COMPANY; SUN VALLEY COMPANY; KMH RANCH COMPANY AND ALL INTERVENORS

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(Continued)

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit Court of Appeals properly affirm dismissal of the Crow Tribe's complaint when the grounds for that dismissal were fully supported by the record?

2. Is the Ninth Circuit's decision that Congress did not vest the Crow Tribe with a private right of action to enforce Section 2 of the Crow Allotment Act of 1920 consistent with the decisions of this Court?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

All parties to the proceeding below were identified at pages ii and iii of the Petition for Writ of Certiorari filed herein.

None of the corporate parties to the proceeding have any parent companies, subsidiaries (except wholly-owned subsidiaries) or affiliates that have issued shares of stock to the public that are not named parties herein.

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INTRODUCTION

The Crow Tribe of Indians brought this action against various non-Indian parties who own land within the Crow Indian Reservation, alleging that these landowners had violated Section 2 of the Crow Allotment Act of 1920, 41 Stat. 751 (1920), simply by virtue of the number of acres of land they owned within the Reservation. The nature of the Tribe's complaint was aptly summarized by the district court:

> In a nutshell, the Tribe asserts that § 2 requires this Court to declare void the defendants' title to land in excess of that allowed by § 2, and convey it to the Crow Tribe, a stranger to that title, without consideration for how long the defendants have held title and when and by whom the land was originally conveyed, nor for the improvements thereon (i.e., homes, buildings, fencing, etc.). Moreover, rather than compensating the present title holders, the Tribe, on the basis of its alleged entitlement under § 2, seeks compensation from the defendants as they leave the property they assumed for years they legally owned.

Crow Tribe of Indians v. Campbell Farming Corp., 828 F. Supp. 1468, 1470 (D. Mont. 1992). Pet. App. B, 12.

Both the district court, 828 F. Supp. 1468, and the Ninth Circuit, 31 F.3d 768, held that the Crow Tribe's complaint should be dismissed, with the Ninth Circuit's holding resting on the fact that the Crow Tribe is not an especial beneficiary of Section 2 of the Crow Allotment Act of 1920 and not vested by Congress with any private right of action to enforce Section 2. *Crow Tribe of Indians v. Campbell Farming Corp.*, 31 F.3d 768 (9th Cir. 1994). The Tribe's Petition to this Court first attempts to call into

question the propriety of the Ninth Circuit's review of the private right of action issue, and then attempts to create confusion concerning the correctness of the Ninth Circuit's analysis.

Supreme Court Rule 10.1 counsels that issuance of a writ of certiorari is "not a matter of right, but of judicial discretion." This case presents no reason to exercise that discretion. Section 2 of the 1920 Crow Allotment Act is unique to the Crow Reservation, and thus this case presents no issues of national importance. The reasoning employed by the Ninth Circuit in this case is in harmony, not conflict, with decisions of other courts of appeal. The Ninth Circuit's holding does not conflict with any decision of a state court of last resort. Finally, the Ninth Circuit's holding in no way represents a departure from the acceptable and usual course of judicial proceedings. Quite to the contrary, it is apparent that the record provides ample support for the Ninth Circuit's conclusion that the Crow Tribe has no private right of action to enforce Section 2. The Ninth Circuit's analysis is also consistent with the directives of this Court for determining whether a particular plaintiff is vested with a private right of action under a statute that does not specifically identify the plaintiff as a party intended to enforce the statute. There simply is no reason for this Court to review this case.

STATEMENT OF THE CASE

On March 4, 1991, the Crow Tribe of Indians ("Tribe") commenced this lawsuit against Campbell Farming Corporation, Robert Earl Holding, Sinclair Oil Corporation, d/b/a Sunlight Ranch Company, Sun Valley Company and KMH Ranch Company. The Tribe's complaint alleged that each of these named defendants owns or controls lands located within the Crow Indian Reservation ("Reservation") in excess of the acreages described in Section 2. The Tribe requested that these named defendants be divested of all land owned by them in excess of the acreages described in Section 2. While the

complaint does not identify in whom title to this land should vest, in subsequently filed briefs the Tribe argued that title to the land should vest in the Tribe.[1] The Tribe's complaint also requested that the defendants be enjoined from further violations of Section 2; that the Tribe be awarded damages for the named defendants' use, occupancy and enjoyment of such land; and that the Tribe recover trespass damages and attorney's fees. Fearing that a ruling in favor of the Tribe would put in jeopardy title to most of the land on the Reservation owned by non-Indians, 162 additional farmers and ranchers owning fee land within the Reservation sought and received permission from the district court to intervene as defendants.[2]

The Crow Indian Reservation encompasses approximately 2.3 million acres of land in southeastern Montana. The Reservation evidences a "checkerboard" pattern of land ownership resulting from the allotment of Reservation lands to individual Indians. The allotment of Crow lands was first sanctioned by the Treaty which established the Reservation. Second Treaty of Fort Laramie, Article VI, 15 Stat. 649 (1868). In addition, the General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887), authorized the allotment of Reservation lands to individual Crow Indians. On June 4, 1920, Congress enacted the Crow Allotment Act of 1920 to further facilitate allotment of Reservation lands. 41 Stat. 751 (1920).

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1. *See* Crow Tribe's "Memorandum in Opposition to Motions to Dismiss" filed in the district court September 17, 1991, pp. 11, 12; Crow Tribe's "Supplemental Memorandum in Opposition to Motion to Dismiss" filed January 28, 1992 in the district court, pp.. 2, 6; and Brief of Appellant Tribe before the Ninth Circuit, p. 36. Copies of these briefs have been lodged with the Court should any member of the Court wish to review them.

2. The originally-named defendants, together with the 162 additional intervening farmers and ranchers, are collectively referred to herein as "Landowners."

Section 1 of the Crow Allotment Act of 1920 provided that allotments made pursuant to the Act shall "vest title (to the lands allotted) in the allottee." Section 1 further provided that individual allotments were to be evidenced by fee patents to "competent" Indians, and by trust patents conveying full possessory rights in the lands allotted, to minors and "incompetent" Indians. Section 2 of the Act applies only to lands allotted to individual Indians and thereafter transferred to non-Indian ownership.[3] Section 2 commands that the Secretary of the Interior is not to approve any conveyance of land by any Crow Indian to any person, company or corporation who owns at least 640 acres of agricultural land or 1280 acres of grazing land within the Reservation. In addition, Section 2 provides that the Secretary shall not approve the conveyance of land by any Crow Indian to any person, company or corporation that already owns land within the Reservation if, after the conveyance, the acquiring party would own more than 1280 acres of agricultural land or 1920 acres of grazing land. Section 2 further provides that any conveyance by an individual Indian, made directly or indirectly, in violation of the above provisions "shall be void and the grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment."[4]

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3. Section 2 applied to both Indian and non-Indian grantees until 1940 when it was amended to allow individual Indians to acquire lands directly from other Indian owners without conceern for acreage limitations in order to consolidate family holdings. *See* 54 Stat. 252 (1940). This 1940 Amendment does not alter the fact that Section 2 applies only to acquisitions from individual Indians.

4. Contrary to the Tribe's claims, Section 2 does *not* prohibit ownership of land in excess of the quantirties set forth in the statute. Section 2 merely restricts the amount of land which may be purchased directly or indirectly from an Indian. *See Dillon v. Antler Land Company,* 341 F. Supp. 734, 740 (D. Mont. 1972), *aff'd,* 507 F.2d 940 (9th Cir. 1974), *cert. denied,* 421 U.S. 992 (1975).

All of the Landowners filed motions to dismiss the Tribe's complaint, advancing a variety of grounds supporting dismissal, including, *inter alia,* that the complaint failed to state a valid claim for relief and that the Tribe lacked standing to pursue the asserted claims. In addition, Campbell Farming Corporation argued that the Tribe's claims were barred by Montana's statutes of limitation and by laches. Campbell Farming Corporation filed an uncontested affidavit in support of its statute of limitations defense, and this aspect of its motion was thereafter treated as a motion for summary judgment.

Contrary to the Tribe's assertions, the precise issue of whether the Tribe could advance a private right of action under Section 2 of the Crow Allotment Act of 1920 was raised in the first brief filed by the Landowners in the district court, and in every other district court brief and in their answer brief filed in the Ninth Circuit.[5] Lengthy portions of the Landowners and the Tribe's briefs also examined the historical context and legislative history of the 1920 Crow Allotment Act, with special emphasis on the purpose and intended beneficiaries of Section 2.[6]

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5. The issue of whether the Crow Tribe had a private right of action to enforce Section 2 was specifically discussed by the parties in the following briefs at the pages noted. Copies of all these briefs have been lodged with the Court should any member of the Court like to review them: *District Court:* (1) Defendant Landowners' Brief in Support of Motion to Dismiss, filed June 19, 1991 at pages 12-23; (2) Plaintiff Crow Tribe's Memorandum in Opposition to Motion to Dismiss, filed September 17, 199, at pages 58, 62-73; (3) Defendant Landowners' Reply Brief in Support of Motion to Dismiss, filed December 11, 1991, at pages 28-40, 51-57; (4) Crow Tribe's Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss, filed January 28, 1992, at pages 52-53; *Ninth Circuit:* (5) Crow Tribe's Appellate Brief, filed December of 1992, at pages 28-30; (6) Joint Brief of Appellees, filed February 19, 1993, at pages 7-11, 20-22;p (7) Crow Tribe's Reply Brief, filed March of 1993, at pages 5-7, 20-21. There is no need to remand this case for further briefing on this already thoroughly discussed issue.

6. The legislative history of Section 2, the 1920 Crow Allotment Act, and

(Cont'd)

Oral argument was held on these motions to dismiss, and on July 15, 1992, such motions were granted by the district court. *Crow Tribe,* 828 F. Supp. at 1468. Pet. App. B, 11. The district court dismissed the Tribe's complaint after concluding that the Tribe had failed to satisfy any of the Article III constitutional requirements for standing. In addition, the district court determined that Campbell Farming Corporation was entitled to summary judgment on its statute of limitations defense inasmuch as federal law required application of Montana's statute of limitations.

The Tribe appealed this decision to the Ninth Circuit. There, the Landowners again advanced the argument that the Tribe was not an especial beneficiary of Section 2, and thus without any implied private right of action to advance their claims. The Tribe responded to this argument in its reply brief. The legislative history and underlying purpose of Section 2 was again discussed in great detail in all the briefs filed with the Ninth Circuit. *See supra,* notes 5 and 6. At oral argument before the Court of Appeals there was also discussion concerning the Tribe's role under Section 2, and the Tribe's inability to pursue any action under this provision of the Crow Allotment Act.[7]

(Cont'd)
the 1887 General Allotment Act were discussed by the parties in the following briefs at the pages noted. Again, copies of these pleadings have been lodged with the Court for its reference. *District Court:* (1) Defendant's Brief in Support of Motion to Dismiss, at pages 5, 20-22; (2) Tribe's Memorandum in Opposition to Motion to Dismiss, at pages 1-4, 23-47; (3) Defendants' Reply Brief in Support of Motion to Dismiss, at pages 30-39; (4) Tribe's Supplemental Memorandum in Opposition to Defendants' Motion to Dismiss, at pages 10-16; *Ninth Circuit:* (5) Tribe's Appellate Brief, at pages 8-22; (6) Joint Brief of Appellees, at pages 4-13; and (7) Crow Tribe's Reply Brief, at pages 13-19. Nothing would be gained by remanding this case for additional briefing on this issue.

7. See Transcript of January 5, 1994 oral argument at pages 6, 7, 8, 9, 18, 20 and 25. A copy of this transcript has also been lodged with the Court should any member of the Court wish to review it.

On July 20, 1994, the Ninth Circuit Court of Appeals, in a unanimous decision authored by Judge William C. Canby, Jr., held that the Tribe has no private right of action to enforce Section 2. In reaching this conclusion, the Ninth Circuit determined both that the Tribe was *not* an especial beneficiary of Section 2, and that the legislative history of the Crow Allotment Act evidenced no congressional intent to vest the Tribe with any private right of action to enforce the provisions of Section 2.[8] The Ninth Circuit affirmed the district court's dismissal of the Tribe's complaint, and subsequently denied the Tribe's petition for rehearing with no judge dissenting.[9]

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8. The Ninth Circuit reviewed this issue in accordance with the four part test delineated in *Cort v. Ash*, 422 U.S. 66, 78 (1975). *See Crow Tribe*, 31 F.3d at 769. These factors are: (1) Does the plaintiff belong to the class for whose especial benefit the statute was passed?; (2) Does the legislative history disclose any intent to create or deny the right?; (3) Is the plaintiff's enforcement of the statute consistent with the statute's purpose?; (4) Is the cause of action one traditionally relegated to state law?

9. This Court has appropriately held that an appellee may defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the lower courts. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 (1979); *Granfinanciera v. Nordberg*, 492 U.S. 33, 38 (1989). In addition to the defenses of lack of standing and lack of a private right of action, the Landowners also asserted that the Tribe failed to join indispensable parties, the Tribe is not the real party in interest, and that Section 2 is unconstitutionally vague as to what activity it proscribes. Finally, Campbell Farming Corporation also demonstrated that the Tribe's claims were barred by Montana's five year statute of limitations. Each of these arguments is supported by the record and would justify affirmance of the District Court and a denial of the Tribe's petition.

REASONS FOR DENYING THE WRIT

I.

THE RECORD FULLY SUPPORTS THE NINTH CIRCUIT'S DISMISSAL.

It is a fundamental and well settled rule that a reviewing court may affirm a lower court's decision on any grounds supported by the record, including grounds different from those relied upon by the lower court. *See e.g., Helvering v. Gowran,* 302 U.S. 238, 245 (1937); *Jaffke v. Dunham,* 352 U.S. 280, 281 (1957); *United States v. Washington,* 969 F.2d 752, 755 (9th Cir. 1992), *cert. denied,* __ U.S. __, 113 S. Ct. 1945, 123 L. Ed. 2d 651 (1993). The Tribe articulates its acceptance of this rule, as it must, but then asserts that the private right of action issue was "unilaterally" reached by the Ninth Circuit without providing the Tribe a "full, fair and meaningful opportunity to be heard." (Pet. 9, 10). In addition to the extensive discussion of the private right of action issue, the standing argument was thoroughly reviewed by all parties. As noted by the Ninth Circuit, the issues of standing and private right of action are similar in that both are primarily concerned with the identity of the party bring the suit. *Crow Tribe,* 31 F.3d at 769. (Pet. App. A, 3); *see also, National Railroad Passenger Corporation v. National Association of Railroad Passengers,* 414 U.S. 453, 455, 456 (1974). The Tribe's characterization of both the Ninth Circuit's review of this issue and the Tribe's opportunity throughout this litigation to present arguments thereon is simply inaccurate and nothing more than an attempt to evoke sympathy where none is warranted.

As notes 5 and 6 indicate, both the Landowners and the Tribe devoted significant portions of their briefs to the specific issue of whether the Tribe could properly assert a private right of action

under Section 2 of the Crow Allotment Act of 1920.[10] The Landowners, at both the district court and the Ninth Circuit, extensively argued that the Tribe could assert no claims based on Section 2, since that section comprised part of an allotment act and was in no way intended to especially benefit the Tribe. In support of this argument, the Landowners quoted to both courts the following portion of this Court's decision in *Montana v. United States,* 450 U.S. 544 (1981), which considered the Crow Allotment Act of 1920:

> The policy of the [allotment] Acts was the eventual assimilation of the Indian population and the "gradual extinction of Indian reservations and Indian titles." The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that this allotment policy was designed to eventually eliminate tribal relations. And throughout the congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian

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10. As further evidence that the private right of action issue was well developed on the record, Landowners direct this Court's attention to Note 18 of the district court decision, *see Crow Tribe*, 828 F. Supp. at 1475, Pet,. App. B., 26:

> Although the Tribe may vigorously protest, prior to the Indian Reorganization Act, Congress did not conclusively express an interest in preserving tribal sovereignty. The legislative background indicates that § 2 was never intended as a cause of action after fee patented land was properly sold the first time. I therefore expect defendants are correct in asserting that the Tribe has no cause of action under § 2. I expect defendants would prevail on their motion to dismiss for failure to state a claim for the same reason. It is simply unnecessary, however, to address those issues in detail since the two threshold issues dealt with in this Memorandum are dispositive.

> population was to be accomplished, in part, by the dissolution of tribal relations.
>
> * * *
>
> There is simply no suggestion in this legislative history that Congress intended that the non-Indians who would settle upon alienated lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

(Citations omitted). *Id.* at 559, n. 9. *See also, Duro v. Reina,* 495 U.S. 676, 691 (1990); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 650 n. 1 (1976).

Against this historic backdrop, the Landowners developed the legislative history behind Section 2. This legislative history shows that Congress did not intend to especially benefit the Tribe or to vest the Tribe with any rights to bring an action to enforce Section 2. *See, e.g.,* Comments of Senator Walsh, S. REP. No. 219, 66 Cong. 1st Sess. (Sept. 23, 1919) (quoted in Joint Brief of the Appellees before the Ninth Circuit, pp. 8, 9); Comments of Representative Riddick, 59 CONG. REC. 5999 (April 22, 1920) (quoted in Joint Brief of the Appellees before the Ninth Circuit, p. 9).

In addition to this discussion, the Landowners specifically cited *Cort v. Ash*, 422 U.S. 66 (1975), and relied upon its four part test to further establish that the Tribe has no private right of action to enforce Section 2. The Tribe also cited repeatedly to *Cort* in arguing that the Tribe did possess a right of action under Section 2. The Tribe was given a full, fair and meaningful opportunity to present arguments on this issue, and the basis of the Ninth Circuit's decision is fully supported by the record.

II.

THE NINTH CIRCUIT HAD TO ADDRESS WHETHER THE CROW TRIBE POSSESSED A PRIVATE RIGHT OF ACTION UNDER SECTION 2.

The Tribe disputes the propriety of the Ninth Circuit's inquiry into whether the Tribe possessed a private right of action under Section 2. However, before a court can consider the merits of a particular plaintiff's complaint, or the propriety of the relief requested, it must be established that the plaintiff is entitled to invoke the judicial process. *Linda R. S. v. Richard D.*, 410 U.S. 614, 616 (1973).

In considering the Tribe's ability to advance the claims asserted in its complaint, it is critical to note that at no relevant time did the Tribe possess any legal entitlement or propriety interest in any of the lands subject to Section 2. Authority from this and other courts confirms that third party strangers to title cannot present a valid cause of action questioning land titles in which they have no interest. *See Fisher v. Rule*, 248 U.S. 314 (1919); *Northern Plains Resource Council v. Lujan;* 874 F.2d 661 (9th Cir. 1989). As the Ninth Circuit noted in *Raypath Inc. v. City of Anchorage*, 544 F.2d 1019, 1021 (9th Cir. 1976).

> [T]he validity of a deed or patent from the

> federal government may not be questioned in a suit brought by a third party against the grantee or patentee, e.g. *St. Louis Smelting and Refining Co. v. Kemp*, 104 U.S. 636, 647, 26 L. Ed. 875 (1882); *VanWyk v. Knevals*, 106 U.S. 360, 369, 1 S. Ct. 336, 27 L. Ed. 201 (1882). Simply stated, a plaintiff in such a case has no cause of action.

Here, too, the Tribe, as a third party stranger to title, cannot bring its claims before the courts because it has no legal property interest in the lands subject to Section 2. Recognizing that the Tribe lacked any interest in the lands involved in their complaint, the Ninth Circuit was required to consider whether Section 2 of the Crow Allotment Act of 1920 provided a separate and independent statutory basis for a private right of action in the Tribe. The Ninth Circuit appropriately conducted that inquiry and appropriately determined that the Tribe had no such basis for bringing its claims.

III.

IN ITS ANALYSIS OF SECTION 2, THE NINTH CIRCUIT CORRECTLY DIFFERENTIATED BETWEEN THE TRIBE AND INDIVIDUAL INDIANS.

A. The Tribe Is Not Mentioned In Section 2.

The Ninth Circuit, in considering whether the Tribe possessed a valid private cause of action under Section 2, began its analysis by carefully reviewing the specific language of the statute to determine if the Tribe was included within the class intended to be especially benefited by the law. *Crow Tribe*, 31 F.3d at 770. (Pet. App. A, 5, 6). In so doing, the Ninth Circuit correctly observed that there is no reference whatsoever to the

"Tribe" within the whole of Section 2. Rather, the Court observed, Section 2 refers to individual Indians in their "individual capacities", to the Secretary of the Interior, and to purchasers of land. As Judge Canby's opinion states, "Conspicuously absent is any reference to the Tribe or even a vague reference to Indians that might create room for argument." *Id.* (Pet. App. A, 6).

B. The Remedy Provisions Exclude The Tribe.

In addition to carefully considering the specific language employed by Congress in Section 2, the Ninth Circuit also looked at the statutory remedies contemplated by the statute to determine whether those remedies disclose that the Tribe, while not mentioned in the statute, was nevertheless intended to possess some private right to enforce Section 2. Again, the Ninth Circuit's review evidenced that the three remedy provisions contained within Section 2 were directed toward individual Indians and the United States, but not the Tribe. *Id.* (Pet. App. A, 7).

At pages 15-17 of its Petition, the Tribe asserts that because the statutory remedy for Section 2 violations might be interpreted to make violative conveyances merely "voidable" and not necessarily "void", the Tribe should be given an opportunity to advance an "equitable" remedy which might bring the Tribe within the scope of those parties covered by the statute. The Tribe's argument appears to be that if void *could* mean voidable, and if the Tribe *could* convince a court that it ought to receive the alleged excess lands, then the Tribe *should* have the right to pursue its own action. Surely, Congress did not envision that such a bootstrapping approach could establish a private right of action. By hypothetically fitting oneself within the ambit of some self-created equitable remedy, one does not become an especial beneficiary of a statute. Further, it is clear that the Tribe's argument in this regard is contrary to settled law that provides

that when a statute sets forth a specific remedy, courts must be especially reluctant to provide other remedies in "the absence of strong indicia of contrary Congressional intent." *Middlesex County Sewerage Authority v. Sea Clammers,* 453 U.S. 1, 15 (1981); *Karahalios v. National Federation of Federal Employees,* 489 U.S. 527, 533 (1989).

The authorities cited by the Tribe for the notion that "void" may mean "voidable" add nothing to the Tribes's position. In *Ewell v. Daggs,* 108 U. S. 143 (1883) this Court held that a contract could be voided by a party to the contract under a Texas usury statute. In *Atlantic Coast Line R. Co. v. State of Florida,* 295 U.S. 301 (1935), the Court noted that charges levied under a void or voidable order of the Interstate Commerce Commission could be claimed as an equitable remedy by those who had paid the charges. Finally, in *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970), the Court concluded that an innocent party to an improper merger could elect to set aside the merger. Significantly, in each of these cases, the party empowered to void an agreement, challenge a rate, or defeat a merger was directly involved in the underlying transaction, and thus possessed their own right of action. The Tribe's analysis of "void" or "voidable", at the remedy stage, begs the question of whether the Tribe has the necessary right of action to *commence* the suit. The fact that an individual Indian grantor may have the election of treating a conveyance completed in violation of Section 2 as void or voidable does not give rise to a private right of action in the Tribe.

C. The Ninth Circuit's Consideration of Legislative History Was No Detour.

In addition to reviewing the statutory language and remedy aspects of Section 2, the Ninth Circuit also specifically considered the legislative history of Section 2 in concluding that Congress intended "only individual Indians to have a right of

action." *Crow Tribe*, 31 F.3d at 771, Pet. App. A, 7. In reaching this inescapable conclusion, the Ninth Circuit noted the Congressional policies in place at the time the Crow Allotment Act was passed and that the Act was intended to further the policy of assimilation by making "individual Indians more independent." As such, the Ninth Circuit correctly concluded that the policy considerations behind allotment would be wholly inconsistent with the notion that Congress intended to provide the Tribe with a private right of action to enforce Section 2. *Id.* Pet. App. A, 9.

The Tribe also asserts that the Ninth Circuit erred and "took a detour" in looking for evidence of Congressional intent to vest the Tribe with a private right of action. This inquiry by the Ninth Circuit involved neither a "detour" nor any error in legal analysis, but rather was in complete accord with the holdings of this Court relative to determining whether a particular plaintiff possesses an implied right of action. In fact, it is now clear that in "determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute." *Thompson v. Thompson,* 484 U.S. 174, 179 (1988). This intent on the part of Congress is the "essential predicate for implication of a private remedy." *Id.*

The Tribe's rationale for objecting to any inquiry into legislative intent is certainly understandable since that inquiry leaves no doubt but that Congress did not intend to place the enforcement of Section 2 in the hands of the Tribe. The Tribe has never, in the district court, circuit court, or this Court, pointed to a single bit of legislative history that would indicate that Section 2 was enacted for the especial benefit of the Tribe, much less that Congress intended to provide the Tribe with an implied private right of action to enforce this section. *See Touche Ross & Co. v. Redington,* 442 U.S. 560, 571 (1979). It is the Tribe's burden to provide this evidence, and the Tribe has consistently failed to

carry that burden. *See Suter v. Artist M,* 503 U.S. 347, 118 L. Ed. 2d 1, 16 (1992).

This Court has instructed that legislative intent may be inferred from the language and context of the statute, as well as from its legislative history. *See Thompson v. Thompson,* 484 U.S. at 180. It was, in fact, these very things that the Ninth Circuit considered in its review of the Tribe's attempt to assert a private right of action in this case. In addition this Court has instructed that the intent to supply a private right of action is to be determined at the time of Congressional passage of the Act under review, and not at some later date, *Id.* Here, all of the indicia of legislative intent in existence at the time of passage of the Crow Allotment Act of 1920 reinforces the Ninth Circuit's determination that the Tribe has no implied right of action to enforce Section 2.

In the face of the Ninth Circuit's thoughtful analysis and compelling reasoning, the Tribe nevertheless asserts that the court committed error, and that the court should have treated the Tribe and individual Indians as one for purposes of the Tribe's complaint. The Tribe conveniently ignores, in advancing this argument, that Section 2 is found within the Crow Allotment Act of 1920. As noted, the 1920 Act was passed to implement the policies behind the General Allotment Act, — the termination of Tribes, the ending of tribal relations and the assimilation of individual Indians into modern society. *Duro v. Reina,* 495 U.S. 676, 691 (1990); ("The 60 years preceding the [Indian Reorganization] Act had witnessed a calculated policy favoring elimination of tribal institutions, sale of tribal lands, and assimilation of Indians as individuals into the dominant culture."); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649, 650 n.1 (1976). These policies are wholly inconsistent with any intent to provide the Tribe with a private right of action. As the Ninth Circuit noted, the language and historical context of

Section 2 leave no doubt but that Section 2 was intended to benefit individual Indians and not the Tribe. Quite simply, the Crow Allotment Act of 1920 was passed with the ultimate expectation by Congress that the Tribe would eventually disappear, not with an expectation or intention that the Tribe should be vested with special rights flowing from the Act. The rights conferred on individual Indians through the allotment process were intended to further the termination of tribal relations and to place individual Indians in an independent status free of tribal influence. The complained of distinction between the Tribe and individual members was, therefore, a distinction made by Congress nearly 75 years ago, and not one created by the Ninth Circuit.

D. The Ninth Circuit's Distinction Between The Tribe And Individual Indians Is Consistent With Applicable Law.

The Tribe asserts that it would defy "common sense" to conclude that a statute giving a private right of action to an individual Indian would not also confer a similar right in the Tribe. Yet, such distinctions between Tribes and individual Indians are regularly and properly reached by the courts and Congress. *See, e.g., Apodaca v. Silvas,* 19 F.3d 1015, 1017 (5th Cir. 1994) (finding individual Indian lacked private right of action to sue under a provision of the Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act of 1987 — because the Act was intended to benefit the Tribe); *Citizens Band of Potawatomi Indian Tribe of Oklahoma v. Collier,* 17 F.3d 1292 (10th Cir. 1994) (finding Indian tribe had no interest in lands located on another reservation which might be allotted to members of plaintiff tribe); 25 U.S.C. § 357 (authorizing the condemnation of allotted lands only). It is also well established that individual Indians have no private right of action to enforce the Indian Non-Intercourse Act, 25 U.S.C. § 177, since that Act was designed only to protect tribal land

rights.[11] *James v. Watt,* 716 F.2d 71, 72 (1st Cir. 1983), *cert. denied,* 467 U.S. 1209 (1984); *United States v. Dann,* 873 F.2d 1189, 1195 (9th Cir. 1989), *cert. denied, Dann v. United States,* 493 U.S. 890 (1989); *Golden Hill Paugussett Tribe of Indians v. Weicker,* 39 F.3d 51, 56 (2nd Cir. 1994). Just as courts have properly distinguished between a tribe and an individual Indian in concluding that only tribes possess a private cause of action to enforce the Indian Non-Intercourse Act, so, too, did the Ninth Circuit properly differentiate between individual Indians and the Crow Tribe in concluding that only individual Indians possess a private right of action to enforce Section 2.

Contrary to the Tribe's inference, *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), Pet. 13, is applicable here and provides a vivid illustration of how the inherent tension between a tribe and its members can impact and limit their respective rights under a statute. In *Santa Clara,* this Court observed that the Indian Civil Rights Act expanded the rights of individual Indians at the expense of certain tribal powers. Similarly, allotments pursuant to the Crow Allotment Act of 1920 depleted the land base of the Tribe. The recognized purpose of allotment acts was to disempower tribes while empowering individual Indians "to take their place as independent, qualified members of the modern body politic." *Poafpybitty v. Skelly Oil Company,* 390 U.S. 365, 369 (1968), quoting *Board of County Commissioners v. Seber,* 318 U.S. 705, 715 (1943). The tension between the interests of the Tribe and individual Indians stemming from the Crow Allotment Act of 1920 further explains why individual Indians may possess a private right of action under Section 2 while the Tribe does not.

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11. The Indian Non-Intercourse Act cannot be looked to by the Tribe since the only lands subject to Section 2 are lands allotted to individual Indians pursuant to the 1920 Crow Allotment Act.

E. The *Puyallup* Decision Does Not Support The Tribe's Argument.

Finally, *Puyallup Tribe v. Washington Game Department,* 433 U.S. 165 (1977), is inapposite to the Tribe's position. In *Puyallup,* the State of Washington, as plaintiff, sought to require members of the Puyallup Tribe to obey state laws controlling fishing for steelhead trout. The State's complaint, which placed in issue the treaty fishing rights of the Puyallup Tribe and its members, did not name the Tribe as a defendant (presumably because of the Tribe's immunity from suit), and instead named a number of individual Indian defendants, including three tribal officials, as well as unidentified tribal members John Doe and Jane Doe. In response to the State's lawsuit, the Puyallup Tribe did appear, both on behalf of its members and in its capacity as a sovereign. The situation presented in *Puyallup* is hardly akin to the instant action.

Here, the Tribe *commenced* this action as the *sole* party plaintiff. In addition, the Crow Tribe looks to an allotment act to support its claims, rather than asserting treaty based defenses. Further, the right of the Crow Tribe to independently pursue its claims has been disputed by the Landowners from the very outset of this case, while in *Puyallup* the Court noted that the record showed no objection to the "Tribe's representation of the individual defendants." 433 U.S. at 170, n. 8.

Another extremely significant difference involves the end result sought to be achieved and the interests sought to be protected in each case. In *Puyallup,* the Puyallup Tribe asserted *its* treaty rights for fishing, rights that were utilized by or which presumably inured to the benefit of all tribal members. Further, the defenses advanced in *Puyallup* directly related to the sovereign rights and powers of the Puyallup Tribe. Here, the Crow Tribe has admitted that Section 2 "does not directly

implicate the Tribe's governmental interests." Pet. 13.[12] Additionally, the relief sought by the Crow Tribe is personal to the Tribe, in the form of monetary damages and title to land. Moreover, the Tribe's admission that some individual tribal members will likely be directly harmed should the Tribe be permitted to pursue its claims clearly distinguishes this case from *Puyallup*. Pet 18, n. 12.[13]

In addition to these obvious and dramatic distinctions, this Court's analysis of the Puyallup Tribe's sovereign immunity defense provides yet another example of the differing treatment accorded tribes and individual Indians. In *Puyallup*, this Court noted that the Tribe was immune from suit, but that individual members of the Puyallup Tribe were not.

> [W]hether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violation of state law by individual tribal members is permissible. The doctrine of sovereign immunity which was applied in *United States*

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12. The Tribe also cites to *Moe v. Confederated Salish & Koorenai Tribes*, 425 U.S. 463 (1976). Again, *Moe* involved issues of tribal sovereignty (Freedom from state taxation) and the effort by a tribe to protect the interests of *all* tribal members (to be free from additional taxes). *See New York Tax Dept. v. Milhelm Attea & Bros. Inc.*, 512 U.S. __, 129 L. Ed. 2d 52, 64 (1994).

13. Even if one accepted the Tribe's faulty premise that because Section 2 benefits individual Indians, the Tribe might also have a private right of action under Section 2, the noted admission of antagonistic interests between the Tribe and individual Indians would be fatal to the Tribe's claims, based on the Tribe's own statement that "in the absence of any indication of an adversity of interest between ... a tribe and its members, one would naturally and ordinarily believe that a law enacted to benefit one also would be intended to benefit the other." Pet. 13.

> *v. United Fidelity and Guaranty Co.*, 309 U.S. 506, 84 L. Ed. 894, 60 S. Ct. 653, does not immunize the individual members of the Tribe.

Puyallup Tribe, 433 U.S. at 171-172. *See also, United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

It is clear that the Ninth Circuit correctly concluded that the Crow Tribe cannot pursue its own action to enforce Section 2 simply because that Section benefits individual Indians who are also members of the Tribe. To have concluded otherwise would defy common sense, and would have required the Ninth Circuit to ignore the intent of Congress expressed in the Crow Allotment Act of 1920.

IV.

28 U.S.C. § 1362 IS A JURISDICTIONAL STATUTE ONLY.

In its Petition (p. 19, 20), the Tribe argues that the Ninth Circuit erred in not considering the "potentially dispositive" impact of 28 U.S.C. § 1362. The Tribe asserts that this statute supplies the Tribe with its missing private right of action by permitting the Tribe to stand in the shoes of the United States and enforce Section 2. The Tribe's argument misapplies this jurisdictional statute and improperly attempts to expand its scope. Section 1362 provides:

> The district court shall have original jurisdiction of all civil actions, brought by any Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy

arises under the Constitution, laws, or treaties of the United States.

Section 1362 was enacted in 1966 for the *sole* purpose of allowing Indian tribes to bring actions in federal court without first satisfying the amount in controversy requirement then existing under the federal question statute. *See* H.J.R. REP. NO. 2040 (Sept. 12, 1966), at 3146; WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE,* § 3579 (1973). Section 1362 provides federal courts with *jurisdiction* over certain federal Indian claims, but that is all it accomplishes. *United States v. Nordic Village, Inc.,* 503 U.S. 30, 112 S. Ct. 1011, 1017, 117 L. Ed. 2d 181, 190 (1992); *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 689 (1991). As this Court has noted, "The fact that Congress grants *jurisdiction* to hear a claim does not suffice to show Congress has abrogated all *defenses* to that claim. The issues are wholly distinct." (emphasis supplied by Court), *Nordic Village Inc.,* 503 U.S. at __, 117 L. Ed. 2d at 190, quoting from *Blatchford,* 501 U.S. at __, 115 L. Ed. 2d at 699.

Congress, in authorizing federal court jurisdiction over tribal claims, did not, and indeed could not, waive the Constitutional requirements which require that every plaintiff validly possess its own cause of action. Thus, while Section 1362 would provide the Tribe access to federal court *if* the Tribe could establish its own private right of action, Section 1362 is of no assistance to the Tribe in this case.

V.

THE NINTH CIRCUIT APPLIED WELL ESTABLISHED LAW IN DETERMINING THAT THE TRIBE HAS NO IMPLIED PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 2.

In attempting to persuade this Court that review of the Ninth Circuit's opinion is appropriate, the Tribe asserts that the Ninth Circuit's analysis of the *Cort v. Ash* standards for a private right of action is in conflict with the decisions of other circuits, and that the conclusions reached by the Ninth Circuit herein are incorrect. The Tribe is wrong on both points.

Initially, it must be noted that the Tribe fails to cite to a single case which supports its assertion that the inquiry undertaken by the Ninth Circuit was legally incorrect or in any way at odds with established case law. The Tribe's citations to *Sterling Suffolk Racecourse Ltd. Partnership v. Barrellville Racing Ass'n Inc.*, 989 F.2d 1266 (1st Cir. 1993) and *American Telephone & Telegraph Co. v. M/V Cape Fear*, 967 F.2d 864 (3rd Cir. 1992) provide no support for the Tribe's attack on the Ninth Circuit's reasoning nor do those cases evidence any conflict between the circuits, since both employed the same analytical reasoning employed herein by the Ninth Circuit. Both cases cited by the Tribe required that there first be a determination of whether the party advancing a particular claim is an "especial beneficiary" of the relevant statute, with the inquiry then proceeding to a determination of whether Congress intended to vest that plaintiff with an implied right of action to enforce such statute. *See American Telephone & Telegraph Co.*, 967 F.2d at 866, 867; *Sterling Suffolk*, 989 F.2d at 1268-1271. These cases describe precisely the type of inquiry undertaken by the Ninth Circuit, and that inquiry is fully consistent with the holdings of this Court. *See, e.g., California v. Sierra Club*, 451 U.S. 287 (1981);

Thompson v. Thompson, 484 U.S. 174 (1988); and *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989).

Much of the Tribe's argument concerning the Ninth Circuit's "especial beneficiary" analysis is built upon the Tribe's faulty premise that the Tribe and individual members must be viewed as one for purposes of Section 2. As discussed at pages 12 through 21, this argument ignores the specific language employed in Section 2, which carefully omits any reference to the Tribe, the remedy provisions of the statute, and the fact that Section 2 was part of an act that was intended to benefit individual Indians at the expense of the Tribe. These factors alone establish that the Tribe is not an especial beneficiary of Section 2, and thus without any private right of action to enforce that section.

Additionally, a review of the Tribe's Petition evidences a continuing misunderstanding of the especial beneficiary requirement. Throughout its Petition, the Tribe argues that it would be "benefited" by enforcement of Section 2 (*see, e.g.*, Pet. 13, 17), and that it has an interest in protecting tribal members and the overall character of the Reservation (Pet. 16). Even if the Tribe's assertions were accepted as true, courts are not free to "engraft a remedy on a statute . . . that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981). Furthermore, the possibility that the Tribe might derive some indirect or ancillary benefit from enforcement of Section 2 does not make the Tribe the *especial* beneficiary of this law. Moreover, any incidental benefit which might arguably be derived from enforcement of this law does not rise to the level that would equate with a finding of obvious Congressional intent to vest the Tribe with a private right of action to enforce Section 2. "The question is not simply who would benefit from the Act, but whether Congress intended to confer federal rights upon those beneficiaries." *California v. Sierra club*, 451 U.S. 287, 294 (1981).

Section 2 was, as noted by the Ninth Circuit, aimed at individual Indians, the allotment process, and the federal government's oversight responsibilities relating thereto. The Act provides specific directives to the Secretary of the Interior when considering whether to approve a conveyance of land held in trust for individual Indians. The fact that this statute is framed as a directive to the Secretary of the Interior further supports the conclusion that Congress did not intend this Section to create any right of action in the Tribe. *See Universities Research Association v. Coutu*, 450 U.S. 754, 772 (1981).

Furthermore, Section 2 provides specific punitive penalties, including criminal penalties, for violations of Section 2. The existence of criminal penalties as an integral part of the enforcement mechanism is extremely instructive that Congress did not intend for tribal enforcement, since Congress has never viewed tribes to have any punitive powers over non-Indians. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Thus, the entire structure, language, context and history surrounding Section 2 demonstrated that Congress intended no one other than the individual Indian owners and the United States to have any special rights to enforce Section 2. *See Dillon v. Antler Land Company*, 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975); *see also, Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). Additionally, inasmuch as Congress has supplied within the statute "elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies. . . ." *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 (1981).

Finally, the Tribe asserts that the Ninth Circuit was required to consider the third and forth *Cort* criteria before deciding whether the Tribe was vested with a private right of action. It is

clear, however, that if the first two criteria set forth in *Cort* are not satisfied, courts need not consider the remaining factors, because the third and fourth factors are only relevant "if the first two factors give indication of Congressional intent to create the remedy." *California v. Sierra Club*, 451 U.S. 287, 298 (1981). Put another way, because the first two factors of *Cort* do not evidence any Congressional intent to vest the Tribe with a private right of action, the "essential predicate for implication of a private remedy plainly does not exist." *Thompson v. Thompson*, 484 U.S. at 179.

CONCLUSION

For all the reasons stated above, the Crow Tribe's petition for a writ of certiorari should be denied.

Respectfully submitted,

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